

must have a charter halibut permit on board the vessel.⁷ The motion for reconsideration must state material matters of law or fact that the administrative judge overlooked or misunderstood.⁸

I have carefully reviewed the Decision in this appeal and Appellant's Motion for Reconsideration. For reasons that follow, I conclude that Appellant has not shown that the Decision contains a material error of law or fact.

ANALYSIS

The Decision contained Findings of Fact 4 and 5:

4. Appellant completed ten additional halibut fishing trips with friends or acquaintances in 2008 who gave him compensation in the form of money to cover expenses or other items of substantial value.
5. Appellant did not report these ten additional trips to ADF&G because he thought at the time they did not rise to the level of being charter trips.⁹

On reconsideration, Appellant restates his argument that he took ten additional trips in 2008 and that, based on NMFS's statements in its answer to the "Family and Friends" Question in the Small Entity Compliance Guide and the Interpretive Rule, he would need a charter halibut permit to take these trips in the future.¹⁰ Appellant is correct that NMFS stated in both the Guide and the Interpretive Rule that if a vessel operator is compensated in any way to assist friends or family members to catch and retain halibut during a trip on the operator's vessel, the vessel operator must have a charter halibut permit on board the vessel.

The Decision did not overlook Appellant's argument based on the Small Entity Compliance Guide. The Decision quoted NMFS's answer to the "Family and Friends" Question in the Guide and concluded:

Appellant argues that because he will need a charter halibut permit in the future to take his friends and acquaintances on a charter

⁷ Order Providing Interpretive Rule (Jan. 27, 2012). Appellant requested clarification, which I provided. Email from Appellant to Steve Hinckle, Appeals Specialist (Jan. 28, 2012); Clarification of Order Providing Interpretive Rule (Jan. 30, 2012)

⁸ <http://www.fakr.noaa.gov/appeals/reconsiderationpolicy.htm>.

⁹ Decision at 3 (footnotes omitted).

¹⁰ Appellant's Motion for Reconsideration, email from Appellant to Steve Hinckle, Appeals Specialist (Oct. 12, 2011); Appellant's Additional Argument, email from Appellant to Steve Hinckle (Jan. 31, 2012). NMFS's original answer to the so-called "Family and Friends" question in its Small Entity Compliance Guide was dated January 6, 2011, and put on the NMFS Alaska Region website. NMFS put a revised answer, dated April 21, 2011, on its website. Exhibits 1 and 2 to Order Adding Documents to Record (May 18, 2011). NMFS published its Interpretive Rule in the Federal Register on April 8, 2011. It appears to be substantially the same as NMFS's revised answer in the Small Entity Compliance Guide. Final Rule, 76 Fed. Reg. 19,708 (Apr. 8, 2011).

halibut trip where they pay for expenses, he should get credit for trips in the past where he took friends and acquaintances and they paid for expenses. Appellant would have gotten credit for the trips he took in the past, where friends and acquaintances compensated him for the trips, if he had reported them to ADF&G in accordance with ADF&G logbook instructions.¹¹

On reconsideration, Appellant states that he did not view the ADF&G Logbook Instructions in 2008 as requiring him to report these ten additional trips.¹² The ADF&G Logbook Instructions for 2008 stated:

A trip that consists of no paying clients, that is, all anglers are “comped”, would NOT be considered a chartered trip and a logbook data sheet should not [be] completed.¹³

Appellant argues that there is a conflict between the ADF&G Logbook Instructions as to when a vessel operator had to report a trip in 2008 and NMFS’s statements as to when a vessel operator must have a charter halibut permit to take a trip beginning in 2011:

The conflict between the ADF&G 2008 logbook instructions and NOAA’s interpretation in the 2011 document (Charter Halibut Limited Access Program) makes the timely filing of the amended trips impossible. ***In 2008 the reference was to clients not necessarily friends or acquaintances as put forth in 2011. Compensation was extended to be beyond a monetary exchange. The rules changed.***¹⁴

Appellant is arguing that NMFS is requiring a vessel operator to have a charter halibut permit to take trips in 2011 but a vessel operator did not have to report this type of trip to ADF&G in 2008, namely trips in 2008 with “friends or acquaintances” and trips in 2008 where compensation was “beyond a monetary exchange.” This is not a basis for me to reconsider the Decision for several reasons.

First, Appellant received money for a majority of these trips. Appellant has consistently stated that for all, or all but two, of his trips with friends and acquaintance in 2008, the trip was not “beyond a monetary exchange.” His friends

¹¹ Decision at 8 (footnotes omitted).

¹² Appellant’s Motion for Reconsideration (Oct. 12, 2011)

¹³ 2008 ADF&G Logbook Instructions at iii *quoted in* Decision at 7. The year 2008 was the first year that ADF&G had this sentence in the Logbook Instructions. The 2009 and 2010 Logbook Instructions on this point were identical to the 2008 Instructions except “be” was added to “should not be completed”. The 2011 and 2012 Logbook Instructions added language that, for a trip not to be reported, the guide may not be compensated. The ADF&G Logbook Instructions from 2002 to 2011 are available on NMFS Alaska Region website, Administrative Appeals, Additional Resources: <http://www.fakr.noaa.gov/appeals/default.htm>. The 2012 ADF&G Logbook is on the ADF&G website at http://www.adfg.alaska.gov/static/license/prolicenses/pdfs/SWLogsheet_2012.pdf

¹⁴ Appellant’s Motion for Reconsideration at 2 (Oct. 12, 2011).

paid him money, although less money than he would have received from arms-length customers. Appellant wrote in a statement dated January 11, 2011: “The number of halibut fishing trips in 2008 would exceed the 15 trip threshold to qualify for a transferable permit if the criteria for family and friends [in the Small Entity Compliance Guide] were applied. ***In the majority of those trips people did leave me money for fuel.***”¹⁵ After receiving NMFS’s first answer to the “Friends and Family” question in the Small Entity Compliance Guide, Appellant wrote on January 24, 2011: “[A]fter reading this question and reviewing my ships log for 2008, I have decided that I believe I have at least 10 additional charters where I took people halibut fishing ***and received some type of compensation.***”¹⁶ Appellant wrote on May 25, 2011:

The 10 additional charters that I submitted fit the old number 7, the new number 7 and ADF&G’s 2008 logbook instructions. None of them were family members ***and all of them compensated me. Should they have been logged in 2008 when they occurred? Perhaps, in hind sight [sic], they should have been.***

At this point in time, all charter participants were informed of being placed on a 2008 logbook as clients, taken fishing for halibut for compensation and none objected to such inclusion. ***Compensation for two of them was non-monetary but clearly items were given of substantial value. The remaining charters gave me money, and while the amounts varied, as I recall it was more than enough to cover expenses.***¹⁷

Even if NMFs were adopting a new definition of “compensation” to be more than money, this change did not have affect Appellant because, for a majority of his unreported trips, his friends did pay him money.

Second, Appellant stated that ***“[t]he 10 additional charters that I submitted fit the old number 7, the new number 7 and ADF&G’s 2008 logbook instructions.”***¹⁸ The old number 7 and the new number 7 refer to Question 7, which was the “Family and Friends” Question in the Small Entity Compliance Guide.

To repeat the definition in the ADF&G Instructions for 2008: “A trip that consists of no paying clients, that is, all anglers are ‘comped’, would NOT be considered a chartered trip and a logbook data sheet should not [be] completed.”¹⁹

The ADF&G Instructions did not exclude family and friends from the definition of a paying client. The ADF&G Instructions equate a “no paying client” with a “comped” angler. “Comped” is a colloquial term. It comes from “comp,” which is

¹⁵ Email from Appellant to Steve Hinckle, Appeals Specialist (Jan. 11, 2011)(emphasis added).

¹⁶ Letter from Appellant to Chief Administrative Judge (Jan. 24, 2011)(emphasis added).

¹⁷ Appellant’s Argument (May 25, 2011)(emphasis added)

¹⁸ Appellant’s Argument (May 25, 2011) (emphasis added)

¹⁹ 2008 ADF&G Logbook Instructions at iii *quoted in* Decision at 7.

short for complimentary and defined in Webster's as "a complimentary ticket; *broadly* : something provided free of charge."²⁰ Appellant's friends were paying clients: with money or something else of value. Appellant's friends, in essence, received discounted tickets for their trips, but not free or "comped" tickets.

On this record, there is no contradiction between the ADF&G 2008 Logbook Instructions to not report trips with no paying clients and NMFS's 2011 statements that require a charter halibut permit for a trip where the operator receives any type of compensation.²¹ The Decision did not err when it concluded that Appellant would have met the requirements for a transferable permit if he had followed ADF&G Instructions to report trips by paying clients.²²

Third, assuming that ADF&G Instructions in 2008 were unclear, Appellant cannot receive a transferable permit under the unavoidable circumstance regulation based on a claim that ADF&G Instructions were unclear and thwarted his participation, because Appellant meets the requirements for a non-transferable permit. The unavoidable circumstance regulation is "limited to persons who would be excluded from the charter halibut fishery entirely unless their unavoidable circumstance is recognized."²³ Since Appellant qualifies for a non-transferable permit, he cannot receive a transferable permit based on the unavoidable circumstance regulation for any circumstance – engine problems, serious illness, unclear ADF&G Instructions, misunderstanding of reporting requirements or any other circumstance.

Finally, in its answer to the "Family and Friends" Question and in the Interpretive Rule, NMFS was not interpreting what an applicant must have done in the past to receive a permit.²⁴ NMFS was interpreting the requirement that, in the future, a vessel operator must have a charter halibut permit on board if one or more charter vessel anglers are catching and retaining halibut.²⁵ Appellant is receiving a non-transferable permit and therefore will have a charter halibut permit. Thus, NMFS's interpretation of when a vessel operator must have a permit in the future will not prevent Appellant from doing what he has done in the past, namely, taking some trips where clients pay full-price and taking some trips where friends and acquaintances pay Appellant for trip expenses.

²⁰ Webster's Ninth New Collegiate Dictionary (1983).

²¹ Interpretive Rule, 76 Fed. Reg. 19,708,19,709 (Apr. 8, 2011)("If the charter vessel guide is compensated in any way to provide assistance, then that charter vessel guide is providing sport fishing guide services under § 300.61.")

²² Decision at 8.

²³ 50 C.F.R. § 300.67(g) *cited in* Decision at 8 & note 39 in the context of Appellant's claim that the economic downturn was an unavoidable circumstance.

²⁴ 50 C.F.R. 300.67(d)(1)(ii)(reported fifteen halibut logbook fishing trips)

²⁵ 50 C.F.R. § 300.67(a)(1)(requirement to have a permit); 50 C.F.R. § 366 (r)(prohibition making it unlawful to "[b]e an operator of a vessel with one or more charter vessel anglers on board that are catching and retaining halibut without an original valid charter halibut permit for the regulatory area in which the vessel is operating.")

ORDER

I conclude that Appellant has not shown that the Decision contains a material error of law or fact in concluding that Appellant does not meet the participation requirement in the recent period for a transferable permit: fifteen reported halibut logbook fishing trips with the same vessel.²⁶ Accordingly, I deny Appellant's Motion for Reconsideration. The new effective date of the Decision is March 22, 2012, unless the Regional Administrator reverses, modifies or remands the Decision pursuant to federal regulation 50 C.F.R. § 679.43(k) and (o).



Mary Alice McKeen
Administrative Judge

Date issued: February 21, 2012

²⁶ 50 C.F.R. § 300.67(d)(1)(ii).